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No. 85-299

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

ROYAL CENTER, INC.,
Petitioner,

VS.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
CULINARY WORKERS UNION, LOCAL 226, and
BARTENDERS UNION, LOCAL 165,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL STATEMENT OF FACTS

The facts set forth in this section should be considered for a full understanding of this case.

RCI[1] and the Joint Board[2] were parties to a collective bargaining agreement which was effective, by its terms, from April 2, 1980 through and including April 1, 1984, and thereafter if neither party moved to terminate. (Petition, Appendix B, p. 4, para. 2). All the events concerning the suspension of operations by RCI the sale of its business to a limited partnership it formed,

[1] Petitioner Royal Center, Inc.

[2] Respondent Local Joint Executive Board of Las Vegas.

and the resumption of operations by the limited partnership, occurred within the stated term of the agreement.

After operations were resumed in November, 1983, the Joint Board filed this action against RCI in December, 1983. (Petition, Appendix A, pp. 3-4). The Joint Board sought to compel arbitration of two grievances which were alternative in character. The first grievance was that RCI violated Section 29.02 of the agreement by selling its business without obtaining a written assumption of the agreement from the buyer. The second was that no bona fide, arms-length sale of the business had actually taken place, and that the business was being operated by 305[3] as an alter ego of RCI. (Petition, Appendix B, p. 5, para. 7). 305 was not joined as a party, and no relief was sought as to it.

Section 29.02 of the collective bargaining agreement provides that in the event the employer sells or assigns his business, a condition to any such sale, assignment or transfer of ownership is that the employer will obtain from the successor or successors in interest a written assumption of the collective bargaining agreement. (Petition, Appendix B, p. 5, para. 5).

As to the alter ego grievance, the preamble to the agreement states that it is made and entered into by and between the Joint Board and RCI, and RCI's successors and assigns. (Petition, Appendix B, p. 4, para. 4).

ARGUMENT

A. Introduction

RCI has in its petition radically changed its tack from the course pursued in the Court of Appeals. There, it argued that it had no duty to arbitrate either of the Joint Board's grievances because of the hiatus between its suspension of operations and the reopening, although both occurred within the stated term of the collective bargaining agreement. (*See* Appendix A, p. 4). Now, RCI does not challenge the decision of the Court of Appeals that it had a general duty to arbitrate grievances arising under the

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[3] 305 Convention Center Drive, L.P.

agreement, and that the issue whether it breached the provision of the agreement requiring it to obtain a written assumption of the agreement from any buyer was properly referred to arbitration. In the petition, RCI has narrowed its attack to the question whether the Joint Board's alternative grievance, based upon an alter ego theory, should also have been ordered to arbitration. On this limited question, it argues that the order is inconsistent with *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board,* 417 U.S. 249 (1974), and that the decision of the General Counsel of the National Labor Relations Board not to issue a complaint on parallel charges filed by the Joint Board should be given some sort of issue-preclusive effect.

B. The Judgement Below, Compelling RCI to Arbitrate a Grievance Pursuant to a Contract to Which It Is a Signatory Party, Is Fully Consistent with This Court's Rulings, Including the *Howard Johnson* Case

The decisions of the courts below are absolutely in accord with the teachings of *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, supra,* the case upon which RCI relies. In *Howard Johnson* the seller, RCI's counterpart, admitted its obligation to arbitrate, and this was given by the court as one of the reasons why the buyer should not be required to submit to arbitration. *Id.,* 417 U.S. at 253, 257-258.

The Joint Board is *not* trying to bind 305 to the collective bargaining agreement or the collective bargaining obligation, or indeed to impose any liability on it. (*See* Petition, Appendix A, p. 11). The only party the Joint Board seeks to compel to arbitrate is RCI, an employer admittedly bound to the collective bargaining agreement.

Not only is RCI the only party, but its potential liability in arbitration is limited to the term of the collective bargaining agreement. The Joint Board made this clear at oral argument in the Court of Appeals, and it is the only sound position for the Joint Board to take in the circumstances of this case. The collective bargaining agreement between the RCI and the Joint Board was still in effect, by its terms, when operations were suspended by RCI, when RCI sold the business to 305, and when

the establishment was reopened for business by RCI and 305 in November, 1983. The liability of RCI under the alter ego theory is necessarily limited to the period between November, 1983 and the date when the collective bargaining agreement expires by its terms. After the expiration of the agreement, recognition of the union and any continued effect of the collective bargaining agreement depends entirely on the view of the National Labor Relations Board on the alter ego question. Only the NLRB can impose a bargaining obligation on an employer in interstate commerce. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). After the expiration of a collective bargaining agreement, some of its terms and conditions may remain in effect, but only in the sense that an employer may not change such terms and conditions, absent impasse or agreement, without committing an unfair practice. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Hinson*, 428 F.2d 133 (CA8 1970). The adjudication of unfair labor practices is of course within the exclusive jurisdiction of the NLRB. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Here, because the NLRB declined to impose any continuing bargaining obligation on RCI or 305, the collective bargaining agreement can have no effect beyond the end of its term. *See U.S. Gypsum Co. v. Steelworkers*, 384 F.2d 38 (CA5 1967), certiorari den., 389 U.S. 1042 (1968).

Therefore, the all-important distinction between *Howard Johnson* and this case is that in *Howard Johnson*, the union already had the predecessor's agreement to arbitrate its liability, which is all the union has obtained from the courts below. But in *Howard Johnson*, the union sought to make the alleged successor a party to an arbitration under a contract it never agreed to, and of course to impose liability upon it under that contract. Nothing of this sort is attempted here. There is no circumvention or inconsistency with the rules developed by the Court governing successorship situations. Rather, the decision of the Court of Appeals falls squarely within that framework.

Aside from *Howard Johnson*, the other authority relied upon by RCI is *American Bell, Inc. v. Federation of Telephone Workers*, 736 F.2d 879 (CA3 1984). This case is, however, distinguishable on precisely the same, fundamental grounds as *Howard*

Johnson: it involved an attempt by a union to bind to a collective bargaining agreement an entity not signatory to it. The same is true of all the other cases cited by RCI. (*See* Petition, pp. 16-17).[4]

C. The Decision of the NLRB's General Counsel Not to Issue a Complaint Is an Exercise of Prosecutorial Discretion Not Entitled to Any Issue-Preclusive Effect

As a general rule, decisions of a tribunal are given issue-preclusive effect only as to issues which have been fully and fairly litigated by the interested parties. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332, 99 S.Ct. 645, 58 L.Ed. 2d 552 (1979). In the procedure of the National Labor Relations Board, the decision to dismiss an unfair labor practice charge is not the culmination of litigation, but rather is a determination that there will be no litigation. It is established that such a decision has no issue-preclusive effect. *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159 (CA7 1984); *Edna H. Pagel v. Teamsters, Local 5995*, 667 F.2d 1275, 1279-81 (CA9 1982); *United Steelworkers of America v. Fort Pitt Steelcasting Division-Conval-Penn, Inc.*, 635 F.2d 1071, 1080 (CA3 1980), certiorari den., 451 U.S. 985, (1981); *Paramount Transportation System v. Teamsters, Local 150*, 436 F.2d 1064 (CA9 1971). The decision not to issue a complaint is simply the exercise of prosecutorial discretion. *Miller Brewing Co., supra.*

In the procedure followed by the National Labor Relations Board, when an unfair labor practice charge is filed it is investigated administratively by the Regional Director in whose area the charge arose. The Regional Director acts as the delegate of the Board's General Counsel. The General Counsel is the Board's prosecutorial arm. 29 C.F.R. Sections 202, 203.1. Evidence concerning an unfair labor practice charge is taken by the Regional Director from the charging and charged parties privately. There is no opportunity to hear the opposing party's evidence, much less to confront and cross-examine witnesses. There is no opportunity to

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[4] Additionally, most of the other cases did not even involve attempts to compel arbitration, but were suits to collect delinquent employee benefit fund contributions.

subpoena witnesses or documentary evidence. The charged party is not even obligated to cooperate with the Regional Director's investigation. 29 C.F.R. Section 101.4; NLRB Casehandling Manual Sections 10056, 10058.

The decision of the Regional Director may be appealed to the General Counsel. It is established that the General Counsel has wide prosecutorial discretion, and the decision whether or not to issue complaint is not judicially reviewable. *Vaca v. Sipes,* 386 U.S. 171, 182 (1967).

The decision of an NLRB Regional Director not to issue complaint is no different, and is entitled to no greater weight, than a decision not to prosecute made by a district attorney, the United States Attorney, the Federal Trade Commission, etc.

In this case, the General Counsel decided not to issue a complaint on the charges filed by the union contemporaneously with the filing of this action. There was no hearing, only an administrative investigation culminating in an exercise of prosecutorial discretion. The General Counsel, through the Regional Director, gave reasons for the decision not to issue complaint, which is typical, but did not and could not make any findings on issues of fact or law fully and fairly litigated between the parties.

There is not the conflict or confusion on this point that RCI suggests. Some cases have held that the refusal to issue complaint, while not issue-preclusive, may be given evidentiary weight. *Smith v. Local 25, Sheet Metal Workers International Association,* 500 F.2d 741 (CA5 1974); *Thomas v. Consolidated C.,* 380 F.2d 69 (CA4 1967). In the principal case relied upon by RCI for the proposition that there is conflict, *Carpenters Local 1478 v. Stevens,* 743 F.2d 1271, 1278-1279 (CA9 1984), an entirely different question was presented. In *Stevens,* the issues deemed precluded were decided by the Labor Board after a representation hearing, in which the parties had the opportunity to, and apparently did, fully and fairly litigate the issues. Therefore, it is fully distinguishable from this case on a point of fundamental legal significance.

RCI's effort to induce a departure from settled doctrine in this case is based on erroneous concepts. It repeatedly suggests in its petition, while never saying it straightforwardly, that the Joint Board is somehow bound to the General Counsel's point of view by an election of remedies. But "whether particular conduct constitutes an unfair labor practice is a distinct question from whether [an employer] must arbitrate a grievance resulting from such conduct." *United Steelworkers of America v. Fort Pitt, supra* at 1080.

Labor Board proceedings and contractual arbitrations are governed by completely different sources of law. The Labor Board proceedings are, of course, governed by the Labor Management Relations Act. But arbitrations are, and must be, governed by the private law of the parties' collective bargaining agreement. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). The interpretation and enforcement of such agrements is entrusted to the courts, not the Board. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427 (1967).

Here, the Board's General Counsel decided not to pursue a complaint to impose upon RCI or 305 a continuing obligation to bargain with the Joint Board. Contrary to RCI's suggestion, the General Counsel did *not* purport to free RCI from its obligations under the existing collective bargaining agreement. (*See* Petition, Appendices C and D). Thus, RCI's suggestion of an intolerable conflict is unfounded. The issues before the NLRB and in arbitration are superficially similar, but the governing sources of law are different. This is not forum shopping, for the Joint Board has pursued *independent* rights in the proper forum for each.

This is also not a case of a disappointed litigant turning to a different forum. As shown in RCI's own statement of the history of this case (Petition, pp. 9-10), but contrary to the suggestions in its argument (Petition, p. 19), the Joint Board pursued its separate remedies simultaneously, and in fact won in the District Court before it lost its appeal to the General Counsel.

CONCLUSION

The petition should be denied.

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Respectfully submitted,

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